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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1082

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court Of Appeals for the District of Columbia Circuit

BRIEF FOR INTERVENOR AND CROSS-PETITIONER HOUFF TRANSFER, INC.

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported officially[1] but has been reproduced as Appendix A to the Petition herein (App. A to Pet. at 1a-83a).[2] Pertinent

[1]It has been unofficially reported at 102 L.R.R.M. 2361 (1979).

[2]The appendices were bound with the Petition.

decisions and orders of the National Labor Relations Board are *International Longshoremen's Ass'n. (Associated Transport, Inc.)* (App. E to Pet. at 110a-184a), which is reported officially at 231 N.L.R.B. 351 (1977) and unofficially at 96 L.R.R.M. 1636 (1977), and *International Longshoremen's Ass'n. (Dolphin Forwarding, Inc.)* (App. D to Pet. at 90a-109a), which appears officially at 236 N.L.R.B. No. 42 (1978) and unofficially at 98 L.R.R.M. 1276 (1978).

JURISDICTION

The Judgment of the Court of Appeals for the District of Columbia Circuit was entered on September 25, 1979 (App. B to Pet. at 84a-86a). Petitions for rehearing and suggestions for rehearing *en banc* were denied on December 13, 1979 (*e.g.*, App. C to Pet. at 87a-89a). The Petition herein[1] was filed on January 10, 1980, and was granted by Order of this Court filed January 21, 1980 (A. 635). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

The relevant statutes are pertinent portions of §§8(b) and 8(e) of the Labor-Management Relations Act, 1947, as amended, 29 U.S.C. §§158(b) and 158(e) (1976), which are as follows:

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[1]Houff Transfer, Inc., a charging party in the proceedings before the Board and an intervenor in the proceedings before the Court of Appeals, filed a cross-petition (No. 79-1109) on January 16, 1980.

"(b) It shall be an unfair labor practice for a labor organization or its agents —

. . .

(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is —

. . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful . . . any primary strike or primary picketing. . . ."

29 U.S.C. §158(b)(4)(ii)(B) (1976)

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void. . . ."

29 U.S.C. §158(e) (1976)

QUESTION PRESENTED

Did the Court below err in refusing to enforce a Decision and Order of the National Labor Relations Board, which had found and concluded that certain vessel-owner employer associations and a labor organization had violated Sections 8(e) and 8(b)(4)(ii)(B) of the Labor-Management Relations Act, in a situation as to which clear and substantial evidence, on the record considered as a whole, established:

(1) That the vessel-owner employer associations and the labor organization had an agreement between themselves that they would cease doing business with motor-carrier employers whose employees continued to engage in the *motor-carrier employees' traditional work* of handling cargo in preparation for its over-the-road transportation; and

(2) That the labor organization enforced said agreement; and

(3) That, moreover, the labor organization had theretofore explicitly waived and abandoned any and all *possible* claim to the specific "work in controversy"?

STATEMENT OF THE CASE

This case originated in May of 1975 when Houff Transfer, Inc. (hereinafter "Houff") and other charging parties filed unfair labor practice charges with the

National Labor Relations Board (hereinafter the "Board").[1]

These charges alleged that the International Longshoremen's Association, AFL-CIO[2] (hereinafter "ILA") and Council of North Atlantic Shipping Associations[3] (hereinafter "CONASA") were engaging in violations of Section 8(e)[4] of the Labor-Management Relations Act (hereinafter the "Act"), by agreeing to cease doing business with motor-carrier employers whose employees continued to engage in traditional motor-carrier employees' work of handling cargo in preparation for its

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[1]Houff's arguments will be addressed primarily to the particular facts and issues directly related to its charges and arising in the Baltimore-Hampton Roads cases, assigned Nos. 77-1735 and 77-1758 in the Court below, reviewing *International Longshoremen's Ass'n. (Associated Transport, Inc.)*, 231 N.L.R.B. 351 (1977) (App. E to Pet. at 110a-184a). Houff, as a charging party, was represented by counsel at the trial of its unfair labor practice charges and filed briefs with the Administrative Law Judge and with the National Labor Relations Board; Houff also intervened, filed a brief, presented oral argument and petitioned for rehearing, suggesting rehearing *en banc*, in the Court of Appeals; and Houff filed a cross-petition in this Court (No. 79-1109).

[2]And its constituent and affiliated labor organizations.

[3]An unincorporated organization whose members are vessel-owner employers' associations for various East-coast ports.

[4]29 U.S.C. §158(e) (1976). These charges alleged that ILA and CONASA agreed: To cease and refrain—and they did cease and refrain—from handling, transporting or otherwise dealing in freight moving to and from the charging parties; and further to cease doing business—and they did cease doing business—with the charging parties.

over-the-road transportation. Houff and the other charging parties also filed separate charges which alleged that ILA was engaging in violations of Section 8(b)(4)(ii)(B)[1] of the Act, by enforcing the above-described agreement between CONASA and ILA.

The Board's Regional Director determined that there was reasonable cause to believe ILA and CONASA were violating the Act as alleged by the charging parties. The Regional Director accordingly issued consolidated complaints, pursuant to 29 U.S.C. §160(b) (1976).

The Board's Regional Director also sought and obtained preliminary injunctions[2] in United States District Courts in Norfolk and Baltimore, enjoining the alleged unfair labor practices in the Hampton Roads and Baltimore port areas.[3]

Upon the Regional Director's consolidated complaints, the merits of the unfair labor practice charges were tried before Administrative Law Judge Leonard M. Wagman.

At trial, the General Counsel's and charging parties' evidence was that longshoremen traditionally handled

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[1]29 U.S.C. §158(b)(4)(ii)(B) (1976). The labor organizations were charged with threatening, coercing and restraining vessel-owner employers with an object of forcing them: To cease handling, transporting or otherwise dealing in freight moving to and from the charging parties; and to cease doing business with the charging parties.

[2]See 29 U.S.C. §160 (l) (1976).

[3]See *Humphrey v. International Longshoremen's Ass'n., AFL-CIO*, 548 F. 2d 494 (4th Cir. 1977).

ocean-going cargo only at the piers, moving and placing packages, cartons, crates, boxes and other containers, of various sizes and descriptions, on and off ships (A. 109, 150, 209-211).

About twenty years ago, the owners of ocean-going vessels began to develop the use of significantly larger containers, usually between twenty and forty feet in length (A. 24, 117, 211). Cargo was loaded or "stuffed" into these larger "trailer-containers" which could be loaded on and off ships without loading and unloading the individual cargo items (A. 114-115). As the handling of containerized cargo continued to develop, ships were fitted for carrying large numbers of trailer-containers which were loaded on and off ships by cranes (A. 211). These containers were designed so they could be hooked onto a power unit for motor-carrier transportation in the ordinary tractor-trailer configuration (A. 211).

Prior to the vessel-owners' utilization of trailer-containers, and prior to the advent of "containerization", motor-carrier employees picked up cargo at inland places of business and delivered the cargo to the piers (A. 150). Similarly, motor-carrier employees picked up cargo at the piers and transported it to recipients' places of business (A. 150). When circumstances dictated, the motor carrier could pick up ocean-going cargo at the piers with local equipment and cause its motor-carrier employees to reload the cargo with other freight, at the port-city trucking terminal and in preparation for over-the-road transportation (A. 23-24, 27-33, 44-45, 83, 185-

186). In the case of export cargo, the motor carrier could, when circumstances dictated, transport such cargo and other freight to its trucking terminal in the port city, for reloading into local equipment in which the cargo would be taken to the piers.[1]

After the large trailer-containers were introduced in the maritime industry, there was not any occasion for the individual cargo items housed in "shipper's load containers" to be removed from the containers at the piers (A. 118-119). "Shipper's load cargo" — cargo consisting of a single shipper's goods, housed in a large trailer-container for transportation by sea and land to a single recipient—required no handling at the piers (A. 24-26, 57, 67, 152-153, 183). In many cases, "shipper's load cargo" and the container in which it was housed simply could be attached to the motor carrier's tractor and towed directly to its destination.[2]

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[1]The reasons for such reloading by motor-carrier employees, as shown by the references above, have always existed in the normal and regular conduct of surface-transportation operations.

[2]As the Administrative Law Judge summarized the evidence: "The advent of containerization in the ports of Baltimore and Hampton Roads did not change the traditional role of the ILA longshoremen. The motor carriers have treated import shippers' loads destined for consignees located more than 50 miles from the center of the port of entry much as they did break-bulk cargo. For, with very rare exceptions, motor carriers have frequently picked up the steamship company's containers mounted on wheeled trailers and hauled them to the consignee in accordance with the bills of lading. The motor carriers have also traditionally hauled such containers to their own truck terminals and have stripped the shippers' loads from them and are loaded into their own trailers, using truck terminal employees, whenever considerations of safety regulation, safety or economy persuaded a motor carrier to take that precaution" (App. E to Pet. at 164a).

"Shipper's load containers" always have moved through the New York, Baltimore and Hampton Roads ports without longshoremen handling their contents and without vessel owners, shippers or recipients having to pay or bear the costs of unnecessary "make-work" loading and unloading (A. 24-26, 152). Nevertheless, when some twenty years ago trailer-containers began to be used more extensively, ILA for the first time contended that all trailer-containers were "an extension of the ship's hold" and that longshoremen were entitled to unload the contents of all such containers at the piers (A. 121-122).

However, this contention on the part of ILA was resolved by an agreement and settlement in ILA's 1959 negotiations with New York Shipping Association, Inc. and by arbitration (A. 118-119, 150-152, 186-188). In such negotiations, as they pertained to "shipper's load containers", ILA gave up any possible claim that longshoremen were entitled to unload "that piece of the hold" (A. 121-122). The 1959 agreement, settlement and arbitration award stipulated that "shipper's load containers" would be granted "free movement" in return for royalty payments to ILA benefit funds (A. 150-152). Thus, the 1959 agreement substituted a royalty cost for any possible claim that longshoremen were en-

titled to unload the contents of "shipper's load containers" at the piers.

Prior to 1968, there were no written Rules on Containers for the Baltimore and Hampton Roads port areas (A. 161, 223). Nevertheless, these ports followed the New York practices and "shipper's load containers" moved on and off ships from and to motor carriers without longshoremen handling their contents (A. 25-26, 223). In 1968, ILA and New York Shipping Association, Inc. entered into a contract setting forth "Rules on Containers", which Rules also were incorporated in the 1968 contracts between ILA and Hampton Roads Shipping Association and Steamship Trade Association of Baltimore (A. 123-124, 235-242, 270-276). These Rules generally provided for loading and unloading of "LTL"[1] and "consolidated"[2] containers by longshoremen at the piers.[3]

Prior to 1971, CONASA was formed for the purpose of negotiating with ILA upon certain "master" issues, in behalf of shipping associations of six East-coast ports, including Baltimore and Hampton Roads (A. 17, 89, 136). Thus, a 1971 agreement between ILA and CONASA set out Rules on Containers which were binding at the six East-coast ports (A. 10, 136). These 1971 Rules were, for all purposes relevant to this case, identical to the 1968 Rules.

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[1]"LTL" refers to "less-than-truckload".

[2]Where the cargo items completely fill the container but are destined to more than one recipient.

[3]See, *e.g.*, Rules A and B (A. 235, 238-239).

None of these various versions or editions of Rules on Containers adopted by ILA and vessel-owner associations purported to make any claim whatever to the work of handling any "shipper's load cargo". The Rules definitely did not employ any language that could result in application of the Rules to "shipper's load" containers and cargo. The 1968 and 1971 Rules on Containers expressly and explicitly defined "the present work jurisdiction of longshoremen" as being "over any containers loaded with LTL cargo, or consolidated full container loads" (A. 235, 241; 243, 249; 270, 275). Other fundamental provisions of the 1968 and 1971 Rules further emphasized this limited work-jurisdiction claim, explicitly reciting that the Rules and ILA's claim of work jurisdiction applied only to containers which housed either "LTL" or "consolidated full" loads (A. 235, 238-239; 243, 247; 270, 272-273).

Both prior to the 1959 agreement and, consistent with their limited work-jurisdiction claim, after 1959, longshoremen never unloaded "shipper's load containers" at the piers (A. 24-26, 152). At all times, however, in connection with their over-the-road transportation of "shipper's load cargo", motor carriers continued to be confronted with the same operational and economic considerations which always had resulted in frequent reloading of various kinds of freight at trucking terminals (A. 23-24, 27-33, 83, 185-188). Vessel owners' trailer-containers also added new economic and operational considerations, including rental charges for the containers and the necessity for locating freight busi-

ness to permit utilization of the container as it was towed back to the port area (A. 28-29, 32-33). When various considerations dictated, the motor carriers continued to cause their employees to unload and reload cargo housed in the trailer-containers, just as they previously had reloaded their own equipment (App. E to Pet. at 164a; A. 23-24, 27-29, 32-33, 186-188).

Undeterred by all the foregoing circumstances, ILA and CONASA, during 1973 and again during 1974, entered into totally unprecedented agreements that their Rules on Containers would apply to "shipper's load containers". As clearly and explicitly provided in all of the agreements prior to the 1974 Agreement, the Rules and ILA's claim of work jurisdiction applied only to containers meeting *all* of three separate criteria (A. 235, 238-239; 243, 247; 270, 272-273). The most basic criterion was that the containers house either "LTL" or "consolidated" loads. In the 1973 "Dublin agreement", however, the 1971 Rules were "interpreted" by the ILA-CONASA Joint Committee on Containers to apply to containers meeting *either* of two expanded criteria, only one of which specified that the containers house either "LTL" or "consolidated" loads.[1] For the first time, "shipper's load containers" purportedly were included among the containers to which the Rules would be applied. Consistent with their "interpretation", ILA and CONASA purported to enact a new rule, restricting

[1]Interpretation 1.1 (A. 264-265).

handling of "shipper's load cargo" to ILA members and to employees of the shippers and recipients.[1]

The 1974 ILA-CONASA Agreement for the first time incorporated Rules provisions consistent with the 1973 "Dublin agreement". The 1974 Rules very clearly purported to apply to "shipper's load containers".[2]

Pursuant to these unprecedented agreements, fines of One Thousand Dollars were imposed upon vessel owners for each and every container in which the cargo was handled differently than the new Rules provided (A. 327-328). ILA and CONASA imposed such fines and caused cancellation of interchange agreements between vessel owners and motor carriers who saw fit to continue their established practice of handling "shipper's loads" and other cargo in connection with their routine over-the-road transportation operations (A. 29-30, 63-64, 327-329). ILA and CONASA thereby caused vessel owners to cease giving freight to motor carriers whose employees continued to handle "shipper's load cargo" and to cease furnishing such motor carriers with containers (A. 63-64, 186-187).

To strengthen enforcement of the new Rules, ILA and CONASA also provided for a "blacklist" of motor carriers who continued their reloading practices, specifying that any container "consolidated or distributed" by such motor carriers would be deemed a violation of

[1]Interpretation 1.1, Par. (b) (A. 264-265).

[2]Specifically, Rules 1(a)(3) and 2(B)(2) (A. 255-257).

the Rules (A. 264, 267-268). ILA and CONASA also agreed that any facility operated in violation of the Rules would not be "served" by any vessel-owner employer and that ILA would not supply labor to any such facility (A. 264, 267-268).

In the context of these developments, which at the time were totally unknown to Houff, Houff continued its practice of reloading "shipper's load cargo" at its trucking terminal (A. 23, 186-188). In early 1974, Houff picked up three "shipper's load containers" at the piers in Baltimore (A. 27-29). Such containers, which were destined to points in Virginia and West Virginia, were transported by Houff to its Baltimore terminal and there unloaded and the cargo reloaded by Houff's employees into its equipment (A. 27-28). These particular containers were unloaded because they were unsafe and heavier than permitted by Virginia weight laws and in order to minimize expenses of transporting the cargo on the highways (A. 28-29). ILA representatives learned of Houff's actions and caused the vessel owners which furnished the containers to be fined One Thousand Dollars in respect of each of the containers (A. 29-30). When Houff refused to pay the vessel owners for the ILA fines, the vessel owners cancelled interchange agreements with Houff and, by refusing to furnish containers to Houff, ceased doing business with it (A. 29-30). As a result, Houff's opportunities to transport "shipper's load cargo" were drastically diminished (A. 33-34, 186-187).

Upon all of the foregoing, Administrative Law Judge Wagman entered "rulings, findings, and conclusions" that the evidence demonstrated ILA and CONASA were engaging in violations of the Act as alleged by the charging parties (App. E to Pet. at 134a-184a). This Decision was affirmed by the Board's Decision and Order (App. E to Pet. at 110a-134a).

Pursuant to Section 10(f)[1] of the Act, ILA and CONASA petitioned the United States Court of Appeals for the District of Columbia Circuit to review and set aside the Board's Decision and Order. Pursuant to Section 10(e)[2] of the Act, the Board cross-applied for the Court of Appeals' enforcement of the Decision and Order.

A panel of the Court of Appeals, with one Judge dissenting, refused to enforce the Board's Decision and Order (App. A to Pet. at 1a-83a). Petitions for rehearing, and suggestions for rehearing *en banc* were denied, with four Judges voting in favor of rehearing *en banc* (App. C to Pet. at 87a-89a).

The Board, ILA, CONASA, Tidewater Motor Truck Association and Dolphin Forwarding, Inc. filed timely petitions for a writ of certiorari.[3] Houff filed a timely

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[1]29 U.S.C. §160(f) (1976).

[2]29 U.S.C. §160(e) (1976).

[3]Nos. 79-1082, 79-1036, 79-1035, 79-1099 and 79-1110, respectively.

cross-petition.[1] The Board's Petition was granted by Order of this Court dated January 21, 1980 (A. 635).

SUMMARY OF ARGUMENT

Clear and substantial evidence, on the record considered as a whole, inescapably dictated the Board's conclusions: (1) That ILA and CONASA entered into an unlawful agreement to cease doing business with motor carriers; and (2) That ILA illegally enforced said agreement.

The Board's conclusions might have been avoided *only* if substantial evidence had supported *findings* that the work of handling cargo in preparation for over-the-road transportation, in circumstances dictated by motor-carrier operations, economics and convenience, had once been work performed only by longshoremen. Substantial evidence supporting such findings might have led to conclusions that ILA's and CONASA's otherwise unlawful acts fell within a judicially-defined, narrow "work-preservation" exception to the provisions of Sections 8(b)(4) and 8(e) of the Act.

ILA and CONASA tacitly have conceded these points, having defended the unfair labor practice charges against them on the sole ground that their activities were in furtherance of "work preservation". ILA and CONASA contend that their 1973 and 1974 alterations to their Rules on Containers were directed to and affected *only* work which was traditional work of long-

[1]No. 79-1109.

shoremen, when such alterations purported to limit *any* handling of "shipper's load cargo" to ILA members and to shippers' and recipients' employees.

Precisely contrary to this present contention on the part of ILA and CONASA, the truth, as fully established by the record in this case, is that longshoremen had *never* engaged in such handling, nor in any equivalent handling. The record likewise establishes indisputably that motor-carrier employees have *always* engaged in handling "shipper's load cargo" *and* other cargo in preparation for over-the-road transportation, in circumstances dictated by the convenience and the operational and economic needs of the motor carriers.

Furthermore, ILA's and CONASA's "work-preservation" defense, in this case, must fail because ILA, as representative of longshoremen at the Baltimore and Hampton Roads ports, has repeatedly and explicitly waived and abandoned any *possible* claim to any work involving the handling of "shipper's load cargo".

Lastly, the facts pertaining to the work of handling "shipper's load cargo" in preparation for its over-the-road transportation clearly support enforcement of the Board's Decision and Order as it relates to such work, even if it shall be held that the Rules affecting "LTL" and "consolidated" cargo-handling are legitimate "work-preservation" agreements.

ARGUMENT

I.

In These Cases, An Unlawful Agreement Between Vessel-Owner Employer Associations And A Labor Organization, To Acquire Work Opportunities For Their Employees And Members By Means Of A Secondary Boycott, Has Been Upheld And Sanctioned By The Court Below

In these cases, only one defense has been made against the allegations that ILA and CONASA unlawfully agreed to cease doing business with Houff and others and that ILA illegally enforced such agreement. ILA's and CONASA's sole contention was that they sought only to secure to longshoremen work which was equivalent to that traditionally performed by longshoremen. Regardless of what may be the applicability of this defense to the facts in distinguishable cases, it is a defense wholly unavailing here, where the "work in controversy" is demonstrably exactly the same work which motor-carrier employees have always performed and is not functionally equivalent to any work that longshoremen have ever performed.

With all due respect, Houff urgently asserts that the Court of Appeals has misapplied its legal analysis to the facts of the present case. In effect, the Court's "work-preservation" analysis is applied so as to uphold a blatant "work-acquisition" agreement and an illegal secondary boycott.

A. Longshoremen Have Neither Performed the "Work in Controversy" Nor Any "Equivalent Work"

In the present case, the specific "work in controversy" is certain handling of "shipper's load cargo"—that is, cargo consisting of a single shipper's goods, housed in a large trailer-container for transportation by sea and land to a single recipient. The handling of such cargo is done in preparation for its over-the-road transportation. Such handling is sometimes, but not always, necessary in the conduct of surface-transportation operations. It is work that always has been performed by motor-carrier employees in the ordinary course of their daily duties, and never has been performed by longshoremen. This work is done without any additional charge to the vessel owner, shipper or recipient (A. 34-35, 62-63). Indeed, there has been an additional charge only when either a shipper or a recipient has specified that the motor carrier was *not* to reload the cargo (A. 26-27, 45). This additional charge has compensated the motor carrier for a net cost increase resulting from not reloading when it would be economically advantageous to reload (A. 27).

As the United States Court of Appeals for the Fourth Circuit succinctly has stated, in ruling that a preliminary injunction was proper *in the present case:*

> ". . . [I]t would seem evident that the 'stripping' of these full shipper's loads by the truckers is not part of the process of loading and unloading the cargo of ships; rather it is done to facilitate and as a part of

the motor carrier's task of transporting the goods from the pier to the consignee. Consequently (and not surprisingly), this work has traditionally been performed by employees of the motor carrier. It follows that such 'stripping' does not fall within the bounds of the longshoremen's traditional role and that the challenged rules are unlawful 'work acquisition' measures. . . ."

Humphrey v. International Longshoremen's Ass'n., AFL-CIO, 548 F. 2d 494, 499 (4th Cir. 1977)

The District of Columbia Circuit rejected the foregoing analysis, suggesting that longshoremen can handle "shipper's load cargo" at the piers, when and if any handling is required in preparation for over-the-road transportation, as readily as motor-carrier employees can accomplish such handling at trucking terminals. Thus, the Court below concluded that because longshoremen readily can perform, therefore they have the right to acquire and perform, work which is done only for the convenience of motor carriers or as a part of surface-transportation operations, and which was performed by motor-carrier employees long before vessel owners began to use trailer-containers. Such a conclusion, it is submitted, goes far beyond, and cannot be justified on, any "work-preservation" rationale.

ILA and CONASA have camouflaged such departure from "work preservation" to "work acquisition" with their unfounded assertion that the Board improperly

focused upon the work of motor-carrier employees after "containerization" rather than focusing upon the work of longshoremen before "containerization". The Board's analysis of longshore work both before and after "containerization" thoroughly refutes this assertion (App. E to Pet. at 139a-168a).

Because the work of handling cargo in preparation for its over-the-road transportation has always been accomplished either before or after longshore cargo-handling at the piers, and has always been done for reasons connected only with surface-transportation operations, the "work in controversy" was not, prior to "containerization", and is not now, "equivalent" to the loading and unloading of ships.

Nevertheless, the Court below adopted the previously repudiated view that a trailer-container can be nothing but an "extension of the ship's hold" and that the handling of container cargo, within an arbitrary radius of many miles of a port, is the same as unloading a ship. Any application of the "extension of the hold" concept to situations in other types of cases is totally inappropriate upon the facts and issues in the present case.

Moreover, as is argued below, longshoremen in return for royalty payments relinquished all *possible* claim to any handling of "shipper's load cargo" as it moved on and off ships. Certainly, however, there is no way that such relinquishment of claim can operate to extend the ship's hold into the surface-transportation industry where the loading and reloading of trailers is normal and basic work.

Indeed, in an earlier similar case, a different panel of the District of Columbia Circuit rejected the notion that a container can be nothing but an "extension of the ship's hold", by sustaining a decision in which the Board stated:

> ". . .[I]t is also true that the same container is part of a truck or perhaps a train. The traditional work of [longshoremen] has been to load and unload ships. To a large extent, the make-work rights claimed by longshoremen with respect to cargo placed on the dock were effectively bargained away. . . ."
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> *International Longshoremen's and Warehousemen's Union, Local 13 (California Cartage Co., Inc.)*, 208 N.L.R.B. 994, 85 L.R.R.M. 1300, 1302 (1974), *enf'd. sub nom. International Longshoremen's and Warehousemen's Union, Local 13 v. N.L.R.B.*, 515 F. 2d 1017 (D.C. Cir. 1975), *cert. den.*, 424 U.S. 942 (1976)

Thus, a "shipper's load container" hooked onto a motor carrier's tractor *is* the second half of an ordinary tractor-trailer tandem and is not, hypothetically, an "extension" of a ship. When a tractor is employed to pull the "shipper's load container" to a motor-carrier terminal for cargo-handling in preparation for over-the-road transportation, the trailer-container *is* likewise

half of an ordinary "city" or "local" tandem and is not, hypothetically, an "extension" of a ship.

Nevertheless, the Court below reasons that the challenged container rules are legitimate because the vessel-operator owners of the containers have a "right to control" them. It is first to be observed that the work of handling cargo is at issue in the present case — not the treatment of trailer-containers. Additionally, the container is *released* to the motor carrier, and the vessel owner, by the terms of the interchange agreement and bill of lading, retains neither control over nor responsibility for the "shipper's load container"[1] or its contents[2] (A. 48-49, 65-66, 189, 203).

Moreover, no false documentation is employed in this, because the cargo actually is transported to the recipient and to the precise destination specified in the documentation and the cargo is merely reloaded as specifically authorized by the bill of lading (A. 298-299 — Sec. 2.(a)).

Again, the vessel owners have never been in any position to control, or to give longshore employees, the work of handling "shipper's load cargo" in preparation for its over-the-road transportation, *because* vessel owners and

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[1]See A. 347, 353—Par. 4.1(a). This Paragraph is incorrectly reprinted and should read as follows: "User [the motor carrier] shall have the right of complete control and supervision of equipment while in its possession. . . ." See also A. 289, 291; 443, 445—Paragraph Fourth (e).

[2]See A. 298-299—Sec. 2.(a).

maritime operations have had nothing to do with determining *whether* such work would be done. The work is performed only when the motor carrier perceives a convenience or necessity in performing it, in the immediate conduct of surface-transportation operations.

The decision of the Court below would require motor carriers to make operational judgments and decisions at the piers and at the time that ocean-going cargo arrives at the piers, rather than at the motor carriers' terminals and at the time the cargo is to be transported over the highways. Thus, motor carriers' operations will suffer, because the cargo-handling is sometimes, though not always, necessary or convenient in the immediate conduct of surface-transportation operations.

As has been argued, the controverted cargo-handling always has been performed by motor-carrier employees in the ordinary course of their daily duties, as a part of routine motor-carrier overhead, and without any additional charge to the vessel owner, the shipper, or the recipient. Accordingly, motor-carrier employees, including those represented by other labor organizations, will be deprived of work they always have performed. Increased costs from additional handling inevitably will be passed on to shippers, recipients and the consuming public.

The ILA-CONASA Rules on Containers now permit loading and unloading of "shipper's load cargo" by employees of shippers and recipients, but not motor-carrier employees. Thus, ILA and CONASA apparently ac-

knowledge that longshoremen cannot fairly claim that *any* loading or unloading of "shipper's load cargo" is "equivalent" to the loading or unloading of ships.

Nevertheless, the motor-carrier employees' work of loading and unloading "shipper's load cargo" purportedly has been acquired by longshoremen and now is dubbed by ILA and CONASA as "shortstopping". Houff submits that this "shortstopping" characterization is an ILA-CONASA smoke screen deployed in an effort to misrepresent and conceal a preexisting work tradition. ILA and CONASA utterly failed to show any application of their 1971 Rules or earlier Rules to "shipper's load cargo" handling by motor-carrier employees. No tribunal has ever found any basis for such application. Indeed, and to the contrary, the Board found that ILA and CONASA never had any rule or understanding either forbidding or pertaining to the cargo-handling they now characterize as "shortstopping".

By the same process, ILA could assert that longshoremen are entitled to claim and acquire the "shipper's load cargo" handling now performed by employees of shippers and recipients. The Court of Appeals' decision herein would equally support such a claim, affecting a substantial portion of all ocean-going shipments. The extraordinary effects of such a decision previously have been noted:

> ". . . Although ILA does not now claim the work of stuffing and stripping shippers' loads, the logic of its position would support a claim for all container

work, without regard to the identity of the competing employees. As we noted in California Cartage Company, 'a boycott to enforce a claim to stuff shippers' loads and door-to-door deliveries would have an enormous impact on the shipping industry.' "

> *International Longshoremen's Ass'n., AFL-CIO (Consolidated Express, Inc.)*, 221 N.L.R.B. 956, 961 (1975), *enf'd. sub nom. International Longshoremen's Ass'n., AFL-CIO v. N.L.R.B.*, 537 F. 2d 706 (2nd Cir. 1976), *cert. den.*, 429 U.S. 1041 (1977), *rehear. den.*, 430 U.S. 911 (1977)

Finally, in addition to its contention that the legal analysis of the Court below has no true application to the facts here presented, Houff also respectfully submits that the Court's decision is in irreconcilable conflict both with a prior decision of the District of Columbia Circuit and with decisions of three other Circuit Courts of Appeals. *International Longshoremen's Ass'n., AFL-CIO v. N.L.R.B.*, 537 F. 2d 706 (2nd Cir. 1976), *cert. den.*, 429 U.S. 1041 (1977), *rehear. den.*, 430 U.S. 911 (1977); *International Longshoremen's Ass'n., Local 1575 v. N.L.R.B.*, 560 F. 2d 439 (1st Cir. 1977); *Humphrey v. International Longshoremen's Ass'n., AFL-CIO*, 548 F. 2d 494 (4th Cir. 1977); and *International Longshoremen's and Warehousemen's Union, Local 13 (California Cartage Co., Inc.)*, 208

N.L.R.B. 994 (1974), *enf'd. sub nom. International Longshoremen's and Warehousemen's Union, Local 13 v. N.L.R.B.*, 515 F. 2d 1017 (D.C. Cir. 1975), *cert. den.*, 424 U.S. 942 (1976).

B. Longshoremen Have Abandoned Any Possible Claim to Any Handling of "Shipper's Load Cargo"

The facts are that in 1959 and repeatedly thereafter longshoremen waived and abandoned any *possible* claim to the work of loading and unloading "shipper's load cargo". In 1973 and 1974, however, ILA sought to claim and acquire for longshoremen the "work in controversy"; that is, the work of loading and unloading such cargo in preparation for its over-the-road transportation—no matter that this work, both prior and subsequent to the "container revolution" in the maritime industry, had always been performed exclusively by motor-carrier employees, at trucking terminals, in the normal and regular conduct of surface-transportation operations—and never had been performed by longshoremen.

All the evidence plainly demonstrates that, prior to 1973, it was never contemplated or intended that longshoremen would handle "shipper's load cargo" for any reason. ILA's 1959 negotiations with New York Shipping Association, Inc. resulted in an agreement and settlement that "shipper's load containers" would be granted "free movement" in return for a royalty payment to ILA benefit funds upon every gross ton of cargo moving

in "shipper's load containers" (A. 152). Even if the "shipper's load container" were considered to be an "extension of the ship's hold", longshoremen gave up any and all possible claim of the right to unload "that piece of the hold" (A. 121-122). "Shipper's load containers" always had moved and after 1959 continued to move through the New York, Baltimore and Hampton Roads ports without longshoremen handling their contents and without vessel owners, shippers or recipients having to pay or bear the wage costs of unnecessary "make-work" loading and unloading.

Prior to the 1973 "Dublin agreement" and subsequent agreement upon the 1974 Rules, none of the various versions or editions of the Rules even purported to make any possible claim to any handling of "shipper's load cargo". The previous Rules decidedly did not employ any language that could result in application of the Rules to "shipper's load" containers and cargo.

Thus, even if the motor-carrier employees' work of handling "shipper's load cargo" in preparation for over-the-road transportation could be deemed in some way equivalent to longshore cargo-handling, any and all possible claim to the longshore cargo-handling was abandoned. Being, at best, premised on an abandoned claim, ILA's and CONASA's work-preservation defense is defective and its rejection by the Board should not be overruled.

The District of Columbia Circuit's enforcement of the Board's Decision and Order in *International Longshoremen's and Warehousemen's Union, Local 13 (California Cartage Co., Inc.), supra,* supports Houff's argument that longshoremen have abandoned any possible claim to any handling of "shipper's load cargo". In that case, the Board held that the Union's renewed work-jurisdiction claims, previously bargained away, could not be sustained. There, as here, the Union abandoned its work-jurisdiction claim in return for payments to its benefit funds. The Union sought to acquire work as to which it had thus abandoned any possible claim and was therefore held to have engaged in violations of Sections 8(e) and 8(b)(4)(ii)(B) of the Act.

In support of their work-preservation defense, ILA and CONASA have cited the Decision of the Administrative Law Judge in *International Longshoremen's Ass'n., AFL-CIO (Consolidated Express, Inc.), supra.* In a most pertinent passage, however, that Decision entirely supports Houff's waiver and abandonment argument.

> "Settled authority vindicates the right of a Union to preserve work which has been in its domain and which it has not lost or abandoned. But certainly, ILA, in view of its history, would not be able to reassert jurisdiction, for example, over the stuffing and stripping of containers containing shippers' loads after having expressly and explicitly abandoned that jurisdiction."
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> *International Longshoremen's Ass'n., AFL-CIO (Consolidated Express, Inc.), supra,* 221 N.L.R.B. at 974

In an attempt to avoid the consequences of ILA's abandonment of any *possible* claim to any work of handling "shipper's load cargo", ILA and CONASA have argued that there was never any agreement or practice which exempted all "shipper's load cargo" from handling by longshoremen. This argument was based upon record evidence that "shipper's load cargo" destined to warehouses in Hampton Roads and Baltimore formerly was handled by longshoremen. Upon such evidence, it was argued that there was no absolute "shipper's load" exemption from the Rules and that ILA never relinquished all possible claim of work jurisdiction over *all* "shipper's load cargo".

A first defect in this argument by ILA and CONASA, as noted by the Board, is that such contention can relate only to "shipper's load cargo" consigned to warehouses —and not to such cargo consigned to any other recipient. A second defect is evident upon the facts that uniform Rules, beginning in 1968, had been negotiated by New York Shipping Association, Inc. and by CONASA and were binding upon the Baltimore and Hampton Roads ports, as well as upon the New York port. Prior to the 1973 "Dublin agreement", "shipper's load cargo" destined to warehouses in Hampton Roads and Baltimore was unloaded by longshoremen, but such cargo destined to warehouses in New York was not unloaded (A. 148-149).

Longshore handling of "shipper's load cargo" destined to warehouses in Baltimore and Hampton Roads loses all significance on the record considered as a whole.

CONASA's President admitted that this practice in Baltimore and Hampton Roads had resulted from *misinterpretation* of the New York Shipping Association, Inc. and CONASA contracts (A. 148-149). Indeed, CONASA's President specified that both ILA and CONASA had always agreed that "shipper's load cargo" destined to a warehouse should move without any longshore handling, just as such cargo destined to a single recipient in another state moved without longshore handling (A. 148-149). Even ILA contended that a *correct* interpretation of the 1971 Rules would allow "shipper's load cargo" to go directly to warehouses without any longshore handling (A. 149). Upon these admissions, any reliance upon erroneous, mistaken and wrongful longshore handling of "shipper's load cargo" destined to warehouses is totally misplaced.

ILA and CONASA also have argued that the "Dublin agreement" merely gave effect to a version of the Rules which existed all along. Thus, ILA and CONASA witnesses offered various descriptions of an alleged pre-Dublin rule relating to "shipper's load cargo". Upon examination, it should be concluded that their attempts to identify such a rule were merely rationalizations for unlawful activities.

CONASA witnesses testified that when motor-carrier employees handled "shipper's loads", such loads became "consolidated" loads to which the Rules applied. These witnesses and others, however, ultimately admitted that "consolidated" loads are and always have been loads destined to more than one recipient (A. 133, 147,

168, 173). "Shipper's loads" handled by motor-carrier employees were still destined and went to single recipients. Additionally, when motor carriers caused "shipper's loads" to be loaded into their own trailers with additional freight, they did not cause freight to be consolidated in a *vessel owner's* container. Accordingly, and in any event, motor-carrier employees' handling of "shipper's loads" did not result in container loads to which any of the Rules formerly applied.

Thus, ILA and CONASA failed to show any application of the former Rules on Containers to "shipper's load cargo" handling by motor-carrier employees. No tribunal has found any basis for such application. Further, ILA and CONASA have hardly satisfactorily explained why a very simple rule could not have been adopted forbidding such handling by motor-carrier employees if such had, all along, been the intent of the parties.

ILA and CONASA also have contended that longshoremen, on occasion, may have handled "shipper's load cargo" at the piers. There was no substantial evidence supporting such contention. It would have been a simple matter for ILA and CONASA to have produced witnesses who could testify that longshoremen had engaged in such handling of "shipper's load cargo" if, in fact, they had. Yet, the only testimony concerning any handling of any "shipper's load cargo" was that such handling had resulted from shipper instructions that the cargo be handled at the pier, for distribution to *multiple* recipients, as in the case of "consolidated" cargo.

Finally, ILA and CONASA introduced bulky container-committee records in an attempt to show that the Rules, prior to the "Dublin agreement", had been deemed to apply to "shipper's load cargo". The record discloses that the number of containers utilized at the Baltimore port grew from approximately 4,000 in 1969 to approximately 25,000 in 1974 and that about eighty percent of such containers would have housed "shipper's load cargo" (A. 103-104). These containers were released at the piers to as many as one hundred separate motor carriers (A. 103). Thus, thousands of "shipper's load containers" were released to as many as one hundred separate motor carriers, many of whom reloaded their contents. Yet, container-committee records only included some fifteen contested matters during the years 1969 through 1972. In a number of these cases, no violation was found. Although it is "difficult to determine" whether any individual case "involved a shipper's load", only five cases might possibly suggest that the 1971 Rules had been applied to motor-carrier handling of "shipper's load cargo" (App. E to Pet. at 152a-153a; A. 103-104). The 1973 "Dublin agreement" was first discussed between September 11 and 13, 1972, at Miami Beach (A. 264). Houff submits that any and all "shipper's load" cases decided prior to September of 1972 were utterly groundless misapplications of the Rules. Given the warehouse misapplications, it is rather surprising that any "shipper's load" cases were isolated. CONASA's witness who had participated in such isolated cases believed that the fines were "illegal" (A. 104-108). Accordingly, substantial evidence, upon the

record considered as a whole, supports the findings by the Administrative Law Judge and the Board that there had been no 1971 Rule restricting handling of "shipper's load cargo" to ILA members and to shippers' and recipients' employees.

Upon all of the foregoing, clear and substantial evidence establishes that ILA waived and abandoned any *possible* claim to any work of handling "shipper's load cargo".

II.

The Court Below Should Have Enforced The Board's Decision And Order, Relative To "Shipper's Load" Cargo-Handling, Even If The Court Properly Upheld Rules Affecting Other Cargo-Handling As LegitimateWork-Preservation Agreements

As has been argued above, motor-carrier employees' handling of "shipper's load cargo", in preparation for its over-the-road transportation, is exactly the same work of loading and unloading trailers which always has been such employees' basic and normal work. It is not work that came into being after "containerization" but is work which routinely, and for many of the same reasons, had been performed before "containerization".

While it is true that work opportunities were diminished by "containerization", it was the work of loading loose cargo on and off ships which was eliminated and to which, in the case of "shipper's load cargo", longshoremen abandoned any possible claim. The motor-carrier employees' work of reloading cargo at trucking

terminals, having been performed to meet the objectives and requirements of motor-carrier operations, has always been accomplished either before or after the cargo has been loaded on or off ships—and has been performed both prior and subsequent to "containerization".

These facts certainly distinguish Houff's case from situations in which, because no separate and distinct work tradition existed, it could be argued that the "work in controversy" is work displaced by technological innovation or other circumstances.

To the extent that *other* employees have a separate or concurrent work tradition—as Houff's employees and all other motor-carrier employees have—such employees cannot be deprived of their work in the name of longshore "work preservation".

Thus, even though the 1968 and 1971 Rules on Containers had clearly and expressly provided for the loading and unloading of "LTL" and "consolidated" containers at the piers and had made a claim of work jurisdiction over such containers, it properly has been held that ILA could not coerce vessel-owner employers, and could not agree with CONASA, to cease doing business with other employers whose employees had established a work tradition of loading and unloading such containers (See, *e.g., International Longshoremen's Ass'n., AFL-CIO v. N.L.R.B.*, 537 F. 2d 706 (2nd Cir. 1976), *cert. den.*, 429 U.S. 1041 (1977), *rehear. den.*, 430 U.S. 911 (1977)).

The last-cited case, hereinafter referred to as the *"Conex"* case, decided issues relating to "LTL" and "con-

solidated" cargo-handling and may be distinguished from Houff's case, which involves only "shipper's load" cargo-handling. Any factual distinctions between *Conex* and Houff's case, however, are such that the *Conex* legal conclusions—that the very same unfair labor practices were being committed—are far more easily reached. Initially, it is indisputable that Houff's employees, and motor-carrier employees generally, had an applicable work tradition that pre-dated "containerization". Furthermore, it also is clear that longshoremen have abandoned any *possible* claim to any work of handling "shipper's load cargo".

The foregoing points specifically were observed in the Administrative Law Judge's Decision in *Conex,* which ILA and CONASA have cited in support of their "work-preservation" arguments. As quoted above,[1] this Decision specified that longshoremen had waived and abandoned any claim "over the stuffing and stripping of containers containing shipper's loads" and could not "reassert jurisdiction" over such work.

Accordingly, any factual distinctions between the *Conex* case and Houff's case would strongly militate in favor of enforcing the Board's Decision and Order in Houff's case. When the cases pertaining to the Rules on Containers have addressed the subject of "shipper's load" cargo-handling, they have with one accord supported enforcement of the Board's Decision and Order in this case.

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[1]Page 29 of this Brief.

Houff's case arose in Baltimore and Hampton Roads and involves only the work of handling "shipper's load cargo" in preparation for its over-the-road transportation. In the Court of Appeals, however, Houff's case was consolidated with cases which arose in New York and involve the work of handling "LTL" and "consolidated" cargo. Upon all of its foregoing arguments, Houff respectfully submits that—even if it be held the Court below properly sustained Rules on Containers affecting "LTL" and "consolidated" cargo-handling as legitimate "work-preservation" agreements—nevertheless, the Court should have enforced the Board's Decision and Order as it relates to motor-carrier employees' handling of "shipper's load cargo".

CONCLUSION

Upon all of the foregoing, Houff Transfer, Inc. respectfully prays that the judgment of the Court below be reversed and that the case be remanded to the Court below with directions that the Decision and Order of the National Labor Relations Board be enforced.

Respectfully submitted,

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